

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
800 K STREET, N.W.  
WASHINGTON, D.C. 20001-8002**

**DATE: March 21, 1997**

**CASE NO: 94-INA-595**

**In the Matter of:**

**NOISE CANCELLATION TECHNOLOGIES, INC.,  
Employer,**

**On Behalf of:**

**LUC VERSCHUEREN,  
Alien.**

Appearance: Concepcion de Montagut, Esq.  
Falls Church, VA  
for the Employer

Before: Neusner, Vittone, and Wood  
Administrative Law Judges

PAMELA LAKES WOOD  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien Luc Verschueren ("Alien") filed by Employer Noise Cancellation Technologies, Inc. ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Boston, MA, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the

alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On December 23, 1992, as amended, Employer filed an application for labor certification to enable the Alien, a Belgian national, to fill the position of "Vice President International Development." Six years of grade school, six years of high school, and four years of college, with a Bachelor of Science in Environment Protection, as well as two years experience in the related occupation of "Manager environmental control/protection" were required. The job offered was described as:

Directs the application, development and marketing of active noise control technology in Europe. Conducts marketing studies to determine potential sales of noise control technology in European marketplace. Establishes research methodology and analyzes statistical data to forecast future marketing trends in European community. Conducts meeting with top level executives to determine their noise control needs and prepares cost estimates and production requirements. Negotiates with top level executives to establish long term business alliances/joint-ventures with NCT. Acts as account manager upon establishment of joint-venture. Confers with scientists at lab and proposes changes to meet client demands and promote cost efficiency and improvements in technology of noise control systems.

(AF 124). Special Requirements were:

Experience in environmental consultancy industry in Europe;  
Experience in developing international markets in the field of environmental control/protection;  
Fluent in [F]rench & Dutch; strong command in German;  
Extensive travel to Europe required.

(AF 124). Letters from the Employer's Chairman indicated that the foreign languages were required because the company was currently doing business with clients from various European countries including Switzerland, France, Belgium, and the Netherlands; it planned to expand field operations in the European marketplace; and to effectively conduct meetings and negotiations with European top level executives, it was necessary for its representative to speak French, Dutch and German. (AF 129, 134-136).

A transmittal form from the state agency indicated that there were seven applicants, four of whom were contacted and none of whom were hired. (AF 96-97). The Employer's recruitment report indicated the basis for rejecting the four ostensibly qualified applicants, noting that two applicants were interviewed. (AF 100).

On March 14, 1994, the CO issued a Notice of Findings in which he notified the Employer of the Department of Labor's intention to deny the application on several bases, citing sections 656.21(b)(6), 656.21(b)(2), 656.21(b)(2)(i)(A),(B)(C), and 656.20(c)(8) of title 20, Code of Federal Regulations. The CO specifically questioned the foreign language requirement, suggested that the job was tailored to the alien's qualifications, and requested specific information concerning the language requirement. (AF 93-95).

The Employer submitted its rebuttal on May 5, 1994 through a pleading entitled "Rebuttal" submitted by counsel and the letter of its Chairman with supporting business documents written in Dutch, German, and French. (AF 44-55).

On June 6, 1994, the CO issued a Final Determination finding the Employer's rebuttal unsatisfactory to show that the job opportunity was clearly open to any qualified U.S. worker, specifically in light of the combination of languages required, and stated that the Employer had conceded this ground by not responding to that portion of the NOF. (AF 14-15).

The Employer, through its attorney, requested review of that denial on July 8, 1994. (AF 1-13).

## **DISCUSSION**

The CO essentially denied the application based upon the Employer's failure to show the job opportunity was clearly open to any qualified U. S. worker, and it appears that it was only in this context that the foreign language requirement was addressed in the Final Determination. Although the CO also argued that the ground of whether the job opportunity was open was conceded by the Employer's failure to specifically address it, we agree with the Employer that the issue was intertwined with the issue of the foreign language requirement and the Employer addressed the issues together. However, we also agree with the CO that the Employer has failed to establish the

existence of a **bona fide** job opportunity open to qualified U.S. workers and that the job requirements are tailored to the Alien.

The regulations require that an employer show that the job opportunity has been and is clearly open to any qualified U.S. worker. **See** 20 C.F.R. § 656.20(c)(8). "Job opportunity" is defined as "a job opening for employment at a place in the United States to which U.S. workers can be referred." 20 C.F.R. § 656.3. Although the words "bona fide job opportunity" do not appear in the regulations, the regulations have been administratively interpreted to include this requirement, **Modular Container Systems, Inc.**, 89-INA-228 (July 16, 1991) (*en banc*), **citing Pasadena Typewriter and Adding Machine Co., Inc. et al. v. U.S. Dept. of Labor**, No. CV 83-5516-AABT (C.D. Cal. 1987). A job is not clearly open to U.S. workers and there is no bona fide job opportunity when the job is tailored to meet the alien's qualifications. **See 100 Plaza Clinical Lab**, 93-INA-288 (Aug. 17, 1994). Under the "totality of circumstances" test, various factors relating to ownership and control are used to determine whether a job is clearly open to any U.S. worker. **Modular Container Systems, Inc.**, 89-INA-228 (July 16, 1991) (*en banc*) (discussing factors).

Concerning the issue of whether there was a bona fide job opportunity, the factors to be considered under the "totality of circumstances" test to determine whether a job is clearly open to any U.S. worker, set forth in **Modular Container Systems, Inc.**, 89-INA-228 (July 16, 1991) (*en banc*), are whether the alien: (1) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (2) is related to corporate directors, officers or employees; (3) was an incorporator or founder of the company; (4) has an ownership interest in the company; (5) is involved in the management of the company; (6) is on the board of directors; (7) is one of a small number of employees; (8) has qualifications for the job identical to specialized or unusual job duties and requirements stated in the application; and (9) is so inseparable from the sponsoring employer because of his or her pervasive presence or attributes that the employer would be unlikely to continue in operation without the alien. Also considered in the "totality of circumstances" standard is the employer's level of compliance and good faith in processing the application and whether the business was created for the sole purpose of obtaining certification for the alien.

Here, there was no job opportunity open to U.S. workers as required by 20 C.F.R. § 656.20(c)(8) when the totality of circumstances are considered. As the person who currently holds the position of Vice President, International Development, the Alien is involved in management of the company but, more importantly, he has qualifications for the job identical to specialized or unusual job duties and requirements stated in the application. In this regard, the job requirements include being "[f]luent in [F]rench [and] Dutch" and having a "strong command in German" (AF 124) and the Alien is described in the application as "Fluent in French & Dutch; strong command of German" (AF 126). Another special requirement is "Experience in developing international markets in the field of environmental control/protection" and the Alien's

experience is described in identical terms (**compare** AF 124 **with** AF 126). Although the job offered is as Vice President, a managerial job, the only degree accepted is a Bachelor of Science in "Environment Protection," and the Alien's college degree in a "B.Sc." in "Chemistry & Environmental Protection" (**compare** AF 124 **with** AF 126). Experience in the job offered is nonqualifying, and instead 2 years of experience in the related occupation of "Manager environmental control/protection" is required. (AF 124). The Alien has experience which appears to meet these criteria. (AF 126-133). It would be difficult to imagine how the job could have been tailored to more specifically meet the Alien's qualifications. Here, there was no job open to U.S. workers; the only worker the Employer ever intended to consider for the position was the Alien.

In view of the above, the application for labor certification should be denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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PAMELA LAKES WOOD  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name:        Noise Cancellation Technologies, Inc.  
                    (Alien: Luc Verschueren)

Case No. :    94-INA-595

PLEASE INITIAL THE APPROPRIATE BOX.

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Thank you,

Judge Wood

Date: